

**December 12, 1994**

**P.S. Protest No. 94-45**

## **CARLA JEAN HENDERSON**

**Solicitation No. 800-156-94**

### **DIGEST**

Protest against contracting officer's determination of nonresponsibility is sustained where the determination was arbitrary and not based on substantial evidence.

### **DECISION**

Ms. Carla Jean Henderson, a sole proprietor, timely protests the contracting officer's determination that she is a nonresponsible bidder for a box delivery highway transportation contract serving 500 boxes in the Payson, AZ, area.

Solicitation No. 800-156-94, issued August 22, 1994, by the Western Area Distribution Networks Office (DNO), Denver, CO, sought sealed bids for daily service (except for Sundays and holidays) and projected a contract term from November 11, 1994, to June 30, 1998. The solicitation estimated that the annual scheduled miles would total 22,700 and estimated annual scheduled hours at 1,920. It also required a "station wagon type vehicle" with at least 80 cubic feet of usable cargo space.

Six bids were received by and opened September 22. The protester's bid was lowest at \$18,176.24.<sup>1</sup> In a September 28 memorandum, the contracting officer asked Ms. Henderson for documentation demonstrating responsibility and informed her that a "bid

<sup>1</sup> Ms. Henderson's bid sheet indicated that she planned to operate the route by herself and that she allocated \$15,360 of her bid for her own wages. She estimated her operating costs at \$500 per year and that she expected her fuel expense to be \$1,162.24, based on 25 miles per gallon.

On her assets and liability statement she indicated that she would use a 1981 Ford Escort as her primary vehicle and that she had for backup a 1979 Chevrolet 4 x 4 pickup truck. She indicated that she had \$500 in cash, and \$21,500 in total assets including jewelry, a horse and horse trailer, and household goods. She indicated \$1,700 in liabilities.

error" was suspected because her price seemed too low. The contracting officer also questioned her planned use of a 13-year-old Ford Escort as well as her financial health.<sup>2</sup> In a letter dated October 3, Ms. Henderson responded, defending her choice of a vehicle, her estimated costs, and her assets.<sup>3</sup> She also stated that the emergency postal contract which she operated from 1984-1986 entailed more responsibility than the route solicited in this case.<sup>4</sup>

<sup>2</sup> The September 28 memorandum advised Ms. Henderson that she was the apparent low bidder but that a responsibility determination was necessary. The contracting officer also wrote that the memorandum was "notice it is suspected you may have made a bid error," asserting the following:

- 1) "You have indicated you plan to utilize a Ford Escort to operate the route. Normally a vehicle of this type provides only fifty . . . cubic feet of usable cargo space." The contracting officer asked Ms. Henderson to contact the Payson postmaster to have the vehicle inspected.
- 2) Ms. Henderson's projected operational cost of \$500 per annum "appears to be low when figuring the expenses incurred when operating a vehicle as required by the contract specifications."
- 3) "Fifteen [miles per gallon instead of 25] is more realistic for a box delivery route. Using this figure the fuel consumption would increase by 605 gallons. At \$1.28 per gallon as you indicate in your bid you would incur an additional \$605.00 in fuel expense."
- 4) Five hundred dollars in cash "does not appear to allow for proper operation of the contract until receipt of the first payment for operation. . . . Explain your intentions on how to finance the route until receipt of the first payment."

The contracting officer also referred to a conversation which Ms. Henderson had had with a member of his staff regarding an emergency postal contract she had held from July, 1984, through September, 1986. In the conversation Ms. Henderson had reported that during the course of that contract, she had been subject to Internal Revenue Service (IRS) and Department of Labor (DOL) investigations. The contracting officer asked Ms. Henderson to provide "a summary" of the investigations as well as "appropriate documentation" related to that contract.

<sup>3</sup> Ms. Henderson enclosed the Postal Service vehicle inspection report, showing that her vehicle passed. The report showed that the vehicle had 80.78 cubic feet of available cargo space because the front and rear passenger seats and rear seat back rest had been removed. Ms. Henderson stated that her "proposed operational cost of \$500.00 per annum is sufficient while using my Ford Escort as it is in excellent condition." She stated that it has new tires and battery, the engine was "completely overhauled" and that the vehicle is a "gas-saver."

Regarding financial resources, she wrote: "I also have funds available to me from both of my children who are in college. My son . . . has over \$2,000 . . . in his accounts; my daughter . . . has nearly \$500; all of which are at my disposal." She stated that she also uses her daughter's Master Card and that she had arranged for credit from a gas station. "I believe this explains how I intend to finance the route until I receive payment for operation, even if it is as long as 2 months."

<sup>4</sup> Also enclosed were Ms. Henderson's five-year driving record and letters of recommendation from former employers, including a superintendent of postal operations who was her supervisor on her previous postal contract. He wrote:

On October 12, the contracting officer notified Ms. Henderson that he was "unable to make an affirmative responsibility determination" because her bid was 23% lower than the next bid and "[she] did not provide satisfactory assurances [she] could maintain service without endangering performance."<sup>5</sup> He also stated that Ms. Henderson was nonresponsible because of an inadequate vehicle, a lack of assets, and a poor credit record. Award was made to Mr. Nicholas Tatalovich, the second lowest bidder, at \$23,366.00. This protest followed.

Ms. Henderson's protest makes the following points:

- It should not matter that her bid was 23% lower than the next lowest bid, because her expenses were figured with her needs in mind. "I have included all elements of cost I expect to incur while performing this contract service."
- She provided "proof of adequate finances to operate for 2 months if necessary."

I have found Ms. Henderson to be a hard working and highly reliable person. After her initial period of training, she required very little supervision as she was very good at understanding and properly interpreting instructions and postal regulations.

For the time she worked for me she performed all of the complicated duties required to deliver mail on a route that was evaluated at 9 1/2 hours per day. This route extended over 100 miles, approximately 1/2 of which was rough dirt roads, and served almost 700 customers.

\* \* \*

I was happy to have worked with her and would gladly recommend her to any prospective employer.

The protester explained that as a result of a vehicle accident it had been necessary to hire drivers temporarily for her postal contract, and subsequently she was assessed for back wages and payroll taxes by the DOL and the IRS. Ms. Henderson has provided evidence showing that both the IRS and DOL liens were subsequently released. The DOL order relieved the protester from the ineligible list under the Service Contract Act because "unusual circumstances exist in this matter which justify such relief." Referring to the wage and tax matters, Ms. Henderson stated: "I know I made some mistakes while under my previous contract, but you can be assured that I have learned from the experience and it will not be repeated."

<sup>5</sup> The October 12 memorandum referred to the accident which led to the DOL and IRS investigations, and concluded that her bid seemed too low to provide for unexpected occurrences:

After experiencing the [problems during the emergency contract], the fact you submitted a bid work sheet . . . without monetary contingencies to allow for hired driver/caser hours and taxes indicates a lack of responsibility to prevent similar problems should another incident occur. Additionally, your bid offer is unable to sustain the cost of a hired driver/caser.

She states that if the contracting officer is not satisfied with "over \$3,000 cash,<sup>[6]</sup> a sound backup vehicle, credit cards available to me and an open charge account at the gas station . . ." then she has other sources of funds "including my mother."

-- She knows "exactly what this job entails" and she "can maintain service of this route without endangering performance."

-- "My bid should be determined by my needs for operation and not compared to another bidder's."

-- She provided all information requested by the contracting officer regarding the Department of Labor and Internal Revenue Service investigations of her former route. She emphasizes that she provided documentation showing that she complied with "all contract, Dept. of Labor and Federal regulations" and that all "claims have been disposed of satisfactorily." See footnote 4.

-- Referring to the contracting officer's belief that her decision to perform the route entirely by herself with no relief driver is unrealistic and would endanger performance, the protester asserts that "it must be recognized that I am allowed to bid as the sole proprietor or owner/operator and operate the route myself." She does not consider it reasonable for the contracting officer to "expect problems in advance" and states that the circumstances which affected her former route "would most probably never be repeated."

-- The protester expresses her belief that hers was the only bid examined in this manner, and that was because of "the information I openly offered to you."

The protester emphasizes that she fully complied with all of the contracting officer's requests for information concerning her responsibility and asserts that "I have proven I am able to operate this route effectively and responsibly." She concludes by assuring the contracting officer that "I am capable of performing the obligations of this contract successfully at the amount I bid. [The contracting officer] should not refuse me this award because of things that happened 8 years ago. [His] only consideration should be that I have proven I am able to operate this route effectively and responsibly."

The contracting officer's statement replying to the protest asserts that Ms. Henderson's operation cost estimate of \$500 per year divided by the 22,699 annual mileage equals \$0.022 per mile, "an extremely low operating cost when compared to other box delivery contracts" within the geographic area.<sup>7</sup> The contracting officer states that Ms. Henderson's rate is "especially low when compared to the government's reimbursement rate of \$0.25 per mile for using a privately owned vehicle . . . ." He asserts that the protester's estimate that she would drive 25 miles per gallon of fuel also is unrealistic "when considering the stop and go nature of a route delivering to 500 boxes."

<sup>6</sup> Ms. Henderson evidently is referring to her access to her children's funds. See footnote 3.

<sup>7</sup> Operational costs include repairs and repair labor, tires and miscellaneous costs.

The contracting officer also asserts that "providing service utilizing a 13 year old vehicle with an extremely low operational cost could endanger the performance of the route." Referring to the September 28 memorandum to Ms. Henderson and her response, the contracting officer reports that the Payson postmaster told him that the Postal Service employee who inspected and passed the protester's vehicle was a good friend of the protester. He concludes that "we were suspicious of the measurements of the vehicle provided on the inspection form" because "past experience shows a vehicle the size of a Ford Escort . . . could not provide the required cubic footage" and because of the information provided by the postmaster.

The contracting officer asserts that based on Ms. Henderson's cash assets of \$500, and his determination that "she would require \$1,394 per accounting period to operate the route"<sup>8</sup> he concluded that the protester lacked assets to "allow for proper operation of the contract until receipt of the first payment for operation." The contracting officer also took into account a consumer credit report<sup>9</sup> and the previous DOL and IRS liens (footnotes 2 and 4) and determined that the protester "was not financially responsible" and lacked a "sound record of good business performance."

Although he acknowledges receipt of DOL and IRS releases cited by the protester, the contracting officer states that Ms. Henderson's plan to work six hours, twenty minutes per day, six days a week for four years without any help is "unreasonable and the bidder should have planned for occasional relief." The contracting officer states that he determined "Ms. Henderson had not learned from her past mistakes and it indicated a lack of responsibility." The contracting officer denies that Ms. Henderson's bid was scrutinized differently than others' and states:

When the Contracting specialist for this area in the State of Arizona solicits a route, he ensures the prospective contractor has funds available to hire a relief person at least 1 day per week at the prevailing Area Wage Determination (AWD). His reason for applying this requirement is based on the fact the Department of Labor Office in Phoenix, AZ, has advised this office they consider a person (even a spouse) who works on this type of schedule a regular driver subject to the AWD.

The contracting officer contends that Ms. Henderson failed to explain adequately what he continued to regard as "bid mistakes," and that acceptance of Ms. Henderson's bid would have been "unfair to her and the offer so unrealistic as to endanger performance."

The protester did not respond to the contracting officer's statement.

## **DISCUSSION**

<sup>8</sup> The contracting officer does not explain how he calculated that figure.

<sup>9</sup> According to the contracting officer, Ms. Henderson's credit report was poor because it showed a "history of three accounts being referred to Collection Agencies and one incident of a Charge Off."

"To be determined responsible, a prospective contractor must:

1. Have financial resources adequate to perform the contract;
2. Be able to comply with the required or proposed delivery or performance schedule . . . ;
3. Have a good performance record;
4. Have a sound record of integrity and business ethics;

\* \* \*

8. Be otherwise qualified and eligible to receive award under applicable laws and regulations."

Procurement Manual (PM) 3.3.1 b.<sup>10</sup>

The standard for our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement[s of the contract] with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

*R.K. Express*, P.S. Protest No. 94-38, October 28, 1994; *OSM Corporation*, P.S. Protest Nos. 91-59; 91-61; 91-67, December 29, 1991.

Although this office's review of a contracting officer's finding of nonresponsibility generally is limited, we find that the contracting officer exceeded his discretion in this case.

The contracting officer based his determination in part on the belief that Ms. Henderson's bid seemed too low to cover operational and fuel expenses and that she did not show that she had adequate resources to perform until she received her first paycheck, which he

<sup>10</sup> PM 3.3.1 a. sets forth the reasons for responsibility determinations as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility . . . .

states could be up to two months. He states that the protester would need \$1,394 to ensure performance until then. On its face, the contracting officer's estimate of \$1,394 appears high for two months of out-of-pocket expenses on this contract. We have held that it is improper for a contracting officer to determine an owner-operator's monthly operating cost based on the total cost of a contract to the Postal Service. *James E. Toney*, P.S. Protest No. 88-45, October 6, 1988; see also *Robin P. McGinnis*, P.S. Protest No. 92-04, March 25, 1992. The record contains no explanation how the \$1,394 figure was determined. Though we cannot conduct our own estimate of the operating costs for a route of this size and type, we also cannot uphold the contracting officer's determinations either of inadequate assets or inadequate allocation of operating and fuel expenses which are premised on estimates of monthly operating costs which appear to ignore the \$1,280 per month that this owner-operator allocated for her own salary in her bid:

In the case of a highway contract held by an owner-operator, any distinction between the allocation of revenue to salary and profit on the worksheet is artificial. For a contractor who drives the route himself, salary is not an expense, it is a characterization of the amount in excess of expenses which the contractor hopes to receive.

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While we recognize that it is critical for highway contractors to have cash reserves to pay for fuel, maintenance, and other expenses before receipt of the first contract payment, the contracting officer's decision in this case is arbitrary since it postulates an unreasonably high monthly operational cost as a basis for finding the protester's [assets] to be inadequate. Further, the contracting officer's decision arbitrarily imposes a requirement that the successful contractor not subsidize operational costs from his salary. . . .

*James E. Toney, supra.* (citations omitted). Similarly, the contracting officer's conclusion that Ms. Henderson is nonresponsible because she underestimated her annual operating and fuel costs is flawed because it seems to ignore the fact that she may reallocate her salary to operational costs at any time. A contracting officer's decision which is based on an assumption that the contractor cannot subsidize costs from salary is arbitrary; it imposes an unreasonable restriction on a contractor. *Id.*

As for the contracting officer's concern that Ms. Henderson's bid was so low that acceptance of it would not have been fair to her, it is well settled that a bid cannot be rejected because it appears to preclude profit after costs. *Lightron of Cornwall, Inc.*, P.S. Protest No. 84-06, February 27, 1984; accord, *Perino's Truck & Auto Body, Inc.*, P.S. Protest No. 91-93, January 24, 1992; *Canteen Service, Inc.*, P.S. Protest No. 90-68, November 15, 1990.<sup>11</sup>

<sup>11</sup> The contracting officer claims that Ms. Henderson failed to explain adequately her suspected bid mistakes. Although a prospective contractor must affirmatively show responsibility, PM 3.3.1 a., and must respond adequately to requests for information concerning responsibility *Express by B & M*, P.S. Protest No. 91-02, February 12, 1991, in this case the contracting officer put too great a burden on the bidder to furnish proof of responsibility. See *Robin P. McGinnis, supra.*; *AHJ Transportation, Inc.*, P.S.

The rejection of Ms. Henderson's vehicle was even more arbitrary. At the contracting officer's request, Ms. Henderson provided the vehicle to the Postal Service for inspection. The resultant report stated that the vehicle met all of the contractual requirements. Not only did the contracting officer ignore the fact, noted on the report, that seats had been removed in order to meet the solicitation's cubic capacity requirement, but he also rejected the inspector's report based on gossip about the inspector's supposed friendship with the protester, which is hardly substantial evidence.<sup>12</sup>

Finally, while we are inclined as a general principle to uphold the judgment that it is unreasonable for an owner-operator not to anticipate contingencies which occasionally could prevent her from operating a six-day per week route, because of the flawed financial analysis in this case, we cannot tell if Ms. Henderson really has no plan or assets with which to deal with emergencies should they occur. The contracting officer's statement that Ms. Henderson seems not to have learned from her experience eight years ago is not supported by the evidence. At that time, she handled the emergency occasioned by her accident by hiring temporary drivers; she did not breach her contract. That she made mistakes for which she subsequently was assessed back taxes and wages is irrelevant to this case, especially since the DOL and IRS have since released her from all obligations.

Since the contracting officer determined Ms. Henderson to be nonresponsible following improper analysis which lead to unreasonable conclusions, we must overturn that determination. *Automated Business Products, Inc.*, P.S. Protest No. 91-16, June 12, 1991. However, we cannot find Ms. Henderson to be responsible, as the determination of a bidder's responsibility is a matter for the contracting officer rather than this office.<sup>13</sup> *Id.*

The matter is remanded to the contracting officer for reconsideration of Ms. Henderson's responsibility in a manner consistent with this opinion. Reconsideration may include reevaluation of Ms. Henderson's vehicle, other assets and finances. If the protester is found to be responsible, the contracting officer is directed to terminate Mr. Tatalovich's contract for convenience and award a new contract for the remaining term to Ms. Henderson.

The protest is sustained to the extent indicated.

Protest No. 88-85, February 2, 1989. The record here shows that Ms. Henderson responded to the contracting officer's inquiries. The failure of the contracting officer to follow up on her responses, such as those relating to her vehicle (see discussion in text, following) and to the assets available from relatives placed too much of the burden on Ms. Henderson. *Id.*

<sup>12</sup> Reinspection of the vehicle by another person would have been a more appropriate response.

<sup>13</sup> A finding of nonresponsibility based on circumstances such as the proposed use of a 13-year-old vehicle and the bidder's limited financial resources might well be warranted. However, the contracting officer must reach that determination through proper analysis and conclusions reasonably based on the record.



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